No. 05 47 JUL 5 - 2005

OFFICE OF THE CLERK

In the Supreme Court of the United States

DENNIS K. MCFADDEN,

Petitioner,

v.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE, DOMINGUEZ STATE JAIL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

MARK ANTHONY SANCHEZ
Counsel of Record
GALE, WILSON & SANCHEZ, P.L.L.C.
THE MILAM BUILDING
115 E. TRAVIS
SUITE 618
SAN ANTONIO, TX 78205
(210) 222-8899
(210) 222-9526 FAX

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTION PRESENTED

1. Whether the Fifth Circuit Court of Appeals erred in affirming the District court granting judgment as a matter of law against McFadden when he proffered legally sufficient evidence to support the jury's finding that TDCJ had intentionally discriminated against him.

PARTIES TO THE PROCEEDING

The Petitioner is Dennis K. McFadden, an individual.

The Respondent is the Texas Department of Criminal Justice.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 2

A. Course of Proceedings and Disposition of the Court Below 2

STATEMENT OF FACTS 2

A. McFadden Suffered an On-the-job Injury While Coming to the Aid of a Fallen Officer . . . 3

B. McFadden Filed a Workman's Compensation Claim and Was Placed on Six Months of Leave To Recover From the Attack 4

C. McFadden Returned to Work Two Weeks Early With Restrictions 5

D. TDCJ Denied McFadden a "Light Duty"Position Although He Was Eligible for It 6

E. TDCJ Alleged that McFadden Violated a Work Rule to Get Medically Evaluated by His Doctor on 8 Hours Notice 6

F. Redus Terminated McFadden for Failing to Get Medically Evaluated by His Doctor On 8 Hours Notice 9

G. Britt Filed a Written Charge of Disciplinary Infraction Against McFadden Without Authority And Without Telling Him 8

H. Dalton Contradicted the Date, Time and MannerThat Britt Said He Processed the Rule 13 ChargeAgainst McFadden 10

I. Kinker Dropped the First Alleged Work Rule Violation and Alleged That McFadden Violated a Second Alleged Work Rule: Failing to Call in Every Day While on Workman's Compensation Leave 11

J. TDCJ Applies a Universal "Three Strikes and You're Out" Work Rule 12

STANDARD OF REVIEW 13

A. The Rule 50 Judgment as a Matter of Law Standard 13

SUMMARY OF ARGUMENT 15

REASONS FOR GRANTING THE WRIT 16

I. THE DISTRICT COURT COMMITTED CLEAR AND REVERSIBLE ERROR WHEN IT GRANTED JUDGMENT AS A MATTER OF LAW IN FAVOR OF APPELLEE 16

A. McFadden Created His Title VII "Work Rule" Prima Facie Case 20

B. McFadden Provided Sufficient Evidence Upon Which a Jury Could Conclude that TDCJ's Proffered Reasons for Terminating Him Were a Pretext for Discrimination 21

1. TDCJ Accused McFadden of Violating Phony Work Rules 21

2. TDCJ Applied a "Double-Standard" to McFadden and Anglo Officers 24

C. The District Court Erroneously Applied the Wrong Standard to McFadden's Evidence 25

D. A Reasonable Jury Found For McFadden 27

CONCLUSION 28

TABLE OF AUTHORITIES

Cases

Aguillard v. McGowen,
207 F.3d 226 (5th Cir. 2000) 14

Blow v. City of San Antonio,
236 F.3d 293 (5th Cir. 2000) 26

Boeing Co. v. Shipman,
411 F. 2d 365 (5th Cir. 1969) 13, 14

Davin v. Delta Air Lines. Inc.,
678 F.2d 567 (5th Cir. 1982) 18

Deines v. Tex. Dep't of Protective and Regulatory Servs. Co.,
164 F.3d 277 (5th Cir. 1999) 14

Evans v. City of Bishop,
238 F.3d 586 (5th Cir. 2000) 26

Fierros v. Texas Dep't of Health,
74 F.3d 187, 192 (5th Cir. 2001) 17

Furnco Constr. Corp. v. Waters,
438 U.S. 567, 98 S. Ct. 2943 (1978) 20

Gowesky v. Singing River Hosp. Sys.
321 F.3d 503, 511 (5th Cir. 2003) 17

Green v. Adm'rs of Tulane Educ. Fund,
284 F.3d 642 (5th Cir.2002) 14

Green v. Armstrong Rubber Co.,
612 F.2d 967 (5th Cir.), *cert. denied*,
449 U.S. 879, 101 S. Ct. 227,
66 L. Ed. 2d 102 (1980) 17, 20

Harrington v. Harris,
118 F.3d 359 (5th Cir. 1997) 16, 20

Harris v. Plastics Mfg. Co.,
617 F.2d 438 (5th Cir. 1980) 18

Hiltgen v. Sumrall,
47 F.3d 695 (5th Cir. 1995) 15, 20

Info. Comm. Corp. v. Unisys Corp.,
181 F.3d 629 (5th Cir. 1999) 15

Little v. Republic Ref. Co.,
924 F.2d 93 (5th Cir. 1991) 18

Malveaux v. Condea Vista Co.,
85 F. Supp. 2d 655 (W.D. La. 1999) 18

McDonnell Douglas Corp. v. Green,
411 U.S. at 80226 . . . . . 18, 19

Polanco v. City of Austin,
78 F.3d 968 (5th Cir. 1996) 14

Pratt v. City of Houston,
247 F.3d 601 (5th Cir. 2001) 25

Reeves v. Sanderson Plumbing Prods., Inc.,
530 U.S. 133, 120 S. Ct. 2097 (2000) . . . . . *passim*

Smith v. Wal-Mart Stores,
891 F.2d 1177 (5th Cir. 1990) 18

St. Mary's Honor Ctr. v. Hicks,
509 U.S. 502, 113 S. Ct. 2742 (1993) 18, 26

Tex. Dep't of Cmty. Affairs v. Burdine,
450 U.S. 248, 101 S. Ct. 1089 (1981) 18

Thrash v. State Farm Fire & Cas. Co.,
992 F.2d 1354 (5th Cir. 1993) 14

Vadie v. Mississippi State Univ.,
218 F.3d 365 (5th Cir. 2000) 16, 20, 26, 28

Wallace v. Methodist Hosp. Sys.,
271 F.3d 212 (5th Cir. 2001) 14, 17, 19

Wright v. West,
505 U.S. 277, 112 S. Ct. 2482 (1992) 19

Statutes and Rules

Title VII of the Civil Rights Act of 1964,
codified at 42 U.S.C. 2000e1 . . . . . *passim*

42 U.S.C. §2000e1 1

42 U.S.C. §2000e 2(a)24 21

Tex. Lab. Code Ann. §451.001 (Vernon Supp. 2004) . . 1

PETITION FOR WRIT OF CERTIORARI

Petitioner, Dennis K. McFadden ("McFadden"), respectfully petitions for a writ of certiorari to review the decision entered in this case by the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit").

OPINIONS BELOW

The opinion of the Fifth Circuit was a *per curiam* opinion and is reprinted in the Appendix ("App.") to this petition at App. A, 1a - 7a. The Judgment entered by the United States District Court for the Western District of Texas (the "District Court") from which the Fifth Circuit appeal was taken was unreported and reprinted at App. D, 12a - 22a.

STATEMENT OF JURISDICTION

On April 4, 2005, the Fifth Circuit entered the Opinion from which review is sought. (See App. A, 1a - 7a). McFadden invokes the jurisdiction of this court pursuant to 28 U.S.C. § 1254 and seeks the issuance of the writ of certiorari pursuant to Supreme Court Rule 10. By holding that McFadden failed to produce legally or factually sufficient evidence, the Fifth Circuit deviated from the Supreme Court's standard for evaluating the sufficiency of evidence as articulated in Reeves. The Fifth Circuit's decision calls for an exercise of this Court's supervisory powers.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the District Court.

On April 5, 2002, McFadden instituted this action against the TDCJ in the United States District Court for the Western District of Texas. McFadden stated a claim for race discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., and the Texas Labor Code §451.001.

On October 29, 2003, finding that McFadden's arguments raised genuine issues of material fact as to the reasons for his termination, the District Court denied TDCJ's pretrial motion for summary judgment. The case proceeded to trial.

The parties presented evidence to the jury between November 3, and November 6, 2003. On November 6, 2003, the jury, after listening to testimony from 9 live witnesses and reviewing 65 total admitted exhibits, returned a verdict in favor of McFadden awarding him $75,000.00 in back pay and $200,000.00 in mental anguish.

The district court subsequently granted TDCJ's motion on March 24, 2004, concluding that the jury's finding of race-based discrimination was against the great weight of evidence. On July 2, 2004, McFadden timely filed a Notice of Appeal as to the District Court's dismissal of the jury verdict.

STATEMENT OF FACTS

McFadden is an African-American resident of San Antonio, Texas. He has been married to Vanessa McFadden since 1980 and has two daughters, Tasia and Keisha who

were 20 and 19, respectively, at the time of trial. McFadden is also a veteran of the United States Army who, after 3 years of admirable service to our country, received an honorable discharge in 1981.

After completing 400 hours of law enforcement training at Southwest Texas State University, McFadden became a peace officer of the state of Texas. He eventually applied for employment with TDCJ and was hired as a Correctional Officer at the Dominguez Unit located in Bexar County, Texas, a position he held for about 10 years, from December 6, 1990 to February 16, 2001.

During his 10 or so years of service to TDCJ, Assistant Warden Kenneth Karl (hereinafter "Warden Karl") supervised McFadden and described McFadden as a good employee who "stood out" because of his "professional appearance," was "sharp," "intelligent," appeared for work as required, and performed his job responsibilities as required. McFadden was a good employee.

A. McFadden Suffered an On-The-Job Injury While Coming to the Aid of a Fallen Officer

On August 10, 2000, McFadden was assigned to work the "administrative segregation" unit where high-risk offenders are housed, including dangerous prison gang members from the Texas Syndicate, the Texas Mafia, the Bloods, and Crips. Specifically, McFadden was injured when he came to the aid of a fellow officer, Sergeant Lewis, who was attacked by a violent inmate while being transported to the unit's infirmary. Instinctively, McFadden tackled the violent inmate, who at the time had beaten Sergeant Lewis to the ground and was continuing to beat him with his fists.